Punitive Damages in the Belgian Perspective

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1. Introduction

The judgment of the Italian *Corte di Cassazione* (Supreme Court) of 5 July 2017 in *AXO v. NOSA* adds another chapter to the story of the exequatur of (American) punitive damages in Europe. The case involved a motorcyclist who had suffered brain injury in an accident which occurred during a motocross race in the United States. Blaming an alleged defect of his crash helmet, he brought a claim in the Circuit Court of the Seventeenth Judicial Circuit for Broward County (Florida) against the Italian manufacturer (AXO), the distributor (Helmet House) and the American reseller (NOSA). NOSA reached a settlement with the victim, resulting in a payment of USD 1 million. With three judgments the Circuit Court and the District Court of Appeal of the State of Florida then granted NOSA's request to be indemnified by AXO for the amount paid to the victim. Subsequently, NOSA sought to enforce the judgments in Italy against the assets of AXO. The Venice Court of Appeal, the first instance court for exequatur proceedings, allowed the enforcement of the American decisions. In particular, it found no violation of Italian (international) public policy,[1] a defense consistently raised against foreign punitive damages judgments. On appeal before the Italian Supreme Court, the issue of the compatibility of foreign punitive damages with Italian (international) public policy unsurprisingly resurfaced. For the first time, the *Corte di Cassazione* ruled that punitive damages do not violate Italy's (international) public policy. The Supreme Court's decision represents a landslide in the treatment of foreign punitive damages judgments. It should serve as an influential example for Belgian judges confronted with similar applications for exequatur.

2. Traditional antipathy

The facts of the *AXO v. NOSA* case are reminiscent of the seminal judgment of the Italian *Corte di Cassazione* in *Glebosky v. Fimez.*[2] In that matter a fifteen year old

1 It should be noted from the outset that in private international matters we deal with a more restricted form of public policy, namely international public policy: A. MILLS, 'The Dimensions of Public Policy in Private International Law', 4. *Journal of Private International Law* 2008, p 213. This derivative from domestic public policy contains only the most fundamental values of the forum and is, therefore, narrower in scope than its internal counterpart. In this comment 'public policy' and 'international public policy' are used interchangeably to refer to 'international public policy' and not to 'domestic public policy'.

2 Corte di Cassazione 19 January 2007, no. 1183, *Rep Foro it* 2007 *v Delibazione* no. 13 and *v Danni Civili* no. 316; *Corr. Giur.*, 2007, 4, 497; translated by F. QUARTA, 'Recognition and Enforcement of

boy got involved in a traffic accident in the city of Opelika, Alabama. A car did not give way and hit the boy's motorcycle, causing him to be thrown off his bike. The buckle of his helmet failed and his unprotected head hit the pavement, resulting in instant death. His mother, Judy Glebosky, sued the driver, the American distributor of the helmet as well as some additional defendants for the amount of USD 3 million before the District Court of Jefferson County in Alabama. Fimez SpA, the Italian manufacturer of the helmet, was later also brought into the proceedings. At trial all parties agreed to a settlement, the amount of which remains undisclosed. Fimez SpA, however, had abandoned the case before this settlement agreement. In a judgment of 14 September 1994 the District Court of Jefferson County in Alabama held the defendant liable for the negligent design of the defective crash helmet.[3] The District Court awarded the victim's mother USD 1 million in damages, without further specification. Mrs. Glebosky then sought execution of that decision in Italy.

When the case reached Italy's highest court in 2007, the Italian Supreme Court explained that the Venice Court of Appeal's factual finding that the US judgment consisted of punitive damages could not be reversed. It further confirmed the Venice Court of Appeal's view that punitive damages violate (international) public policy and declined to enforce the Alabama court's USD 1 million award. It did not uphold Mrs. Glebosky's contention that the US decision did not violate public policy because the Italian liability system contains several legal institutions, such as penalty clauses and moral damages, which pursue punitive objectives. The *Corte di Cassazione* declined to analogize punitive damages to penalty clauses and moral damages.

According to the Italian Supreme Court, damages in private law are not connected to the idea of punishment or to the wrongdoer's misconduct. These damages are intended to compensate the injured party by eliminating the consequences of the inflicted harm through the award of a sum of money. This is true for all types of civil damages, including moral damages, which are not influenced by the victim's conditions or the wrongdoer's wealth, but require concrete and factual evidence of the loss suffered. In other words, Italy's highest court built a strong dogmatic wall between compensatory and punitive damages, with absolutely no room for overlap. Compensatory damages, such as moral damages, focus on the victim, relate to his or her loss, and intend to make him or her whole. On the other hand, punitive damages centre on the

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U.S. Punitive Damages Awards in Continental Europe: The Italian Supreme Court's Veto', 31. *Hastings International & Comparative Law Review* 2008, Appendix A, pp 780–782.

3 The District Court had already rendered the USD 1 million award in a non-final decision of 1 April 1991 or 1 January 1991 (the Venice Court of Appeal's judgment mentions both dates throughout its text). The judgment of 14 September 1994 confirmed the previous order, declared it final and added reasons for it.

wrongdoer's behaviour, are not connected to the damage suffered, and pursue the punishment of the tortfeasor.

The Italian Supreme Court affirmed this position in a judgment of 8 February 2012.[4] The Middlesex Superior Court in Massachusetts had ordered an Italian company to pay USD 8 million to an employee who had suffered injuries in an accident at the Italian corporation's US subsidiary. The judgment did not mention punitive damages nor the criteria used to quantify the award. As was the case in *Glebosky v. Fimez*, the Italian courts were confronted with a global award without further specification or demarcation. The Court reiterated that the Italian civil liability system is strictly compensatory and not punitive. The USD 8 million in damages awarded was thus unenforceable on the basis of the public policy exception.[5]

3. Groundbreaking U-turn in *AXO v. NOSA*

In *AXO v. NOSA* the Italian Supreme Court rejected AXO's appeal because it did not accept that the award in question had a punitive character. It nevertheless took the opportunity (derived from Art. 363 of the Code of Civil Procedure) to rule on the compatibility of a foreign judgment containing punitive damages with the Italian legal system.

The *Corte di Cassazione* radically changed its stance regarding the enforcement of punitive damages. It held that punitive damages are not ontologically contrary to the Italian legal system. It pointed to various examples of provisions in Italian law, introduced in the last decades, that pursue a punitive goal. The Court now accepts that civil liability law has evolved to the point that the idea of a punitive function being attached to a damages award is no longer incompatible with it. According to the Supreme Court, next to the primary function of compensation, new functions such as prevention and sanctioning have emerged, leading to a multifunctional dimension of liability law. In that context it would be inadequate to refuse any remedies not precisely fitting in the category of compensation.

This does not mean that foreign judgments will be given unhindered access to the Italian territory. In that regard the Court identifies a number of principles that foreign punitive awards need to satisfy in order to be imported into the Italian system. There must be an adequate legal basis for the punitive damages awarded. Additionally, the facts subject to punishment must be precisely pre-identified guaranteeing the standardization of cases in which punitive damages may be

4 Corte di Cassazione 8 February 2012, Soc Ruffinatti v. Oyola-Rosado, no. 1781/2012, *Danno resp* 2012, p 609.

5 F. Quarta, 'Foreign Punitive Damages Decisions and Class Actions in Italy', in D. Fairgrieve & E. Lein (eds), *Extraterritoriality and Collective Redress* (Oxford: Oxford University Press 2012), p 275, n. 32.

awarded. Furthermore, the awards must adhere to the principle of predictability, in that limits must be set as to the punitive damages that may be granted. The Italian courts faced with a foreign punitive award must, moreover, check the proportionality between the compensatory damages and punitive damages and between the punitive damages and the wrongful conduct.

4. Consequences for Belgium

In Belgium, as in Italy, the legal source regulating the enforcement of foreign judgments depends on the origin of the judgment. If the enforcement of an American judgment containing punitive damages is requested in Belgium, the Brussels I*bis* Regulation does not apply because that instrument only deals with intra-EU judgments. There is no treaty between the European Union and the United States arranging for the mutual recognition and enforcement of judgments. Belgium equally has not concluded a bilateral convention with the United States. The recognition and enforcement of US decisions in Belgium is, therefore, governed by Belgium's national (or residual) rules of private international law.

The residual private international law regime is laid down in the Belgian Code of Private International Law.[6] Pursuant to Article 23, sections 1 and 2 the court of first instance of the domicile or the habitual residence of the defendant has, in principle, jurisdiction to hear actions for recognition and enforcement of a foreign judgment. Article 25 lists the grounds for refusal of recognition and enforcement. The most important ground in the context of punitive damages is to be found in Article 25, section 1, 1°. Under that provision recognition or enforcement can be denied if the result of the recognition or enforceability would be manifestly incompatible with public policy. Upon determining the incompatibility with the public policy special consideration is given to the extent in which the situation is connected to the Belgian legal order and the seriousness of the consequences, which will be caused thereby.

To our knowledge there is no published case law in Belgium dealing with the application of the public policy exception to (American) punitive damages. Belgian judges, therefore, have no previous examples to draw inspiration from. They can, however, rely on judgments from other EU countries, especially at the level of the Supreme Court. The *Corte di Cassazione*'s ruling in *AXO v. NOSA* will form an important building block for the creation of a judicial approach to the enforcement of US punitive damages in Belgium. The decision clearly demonstrates that the concept of punitive damages can no longer be held to be contrary to international public policy.

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6 Wet van 16 juli 2004 houdende het Wetboek van internationaal privaatrecht, *B.S.* 27 July 2004, p 57344.

The Italian Supreme Court based this reasoning on the existence of provisions in Italian law pursuing a punitive aim. We have argued before that if it can be shown that a legal system contains private law instruments which resemble punitive damages or which pursue the same goals, internal legal coherence would demand the acceptance of US punitive damages at the enforcement stage. When a legal system itself contains punitive-like remedies in private law, it cannot declare punitive damages unenforceable by using the international public policy shield. The country would be guilty of legal hypocrisy if it were to reject US punitive damages as violating international public policy while at the same time acknowledging or condoning similar instruments in its substantive law.[7] By accepting that punitive damages, in principle, do not trigger the public policy exception, the Italian *Corte di Cassazione* joins the camp of the French and Spanish Supreme Courts. These Courts already acknowledged the compatibility with international public policy.[8] The German *Bundesgerichtshof*, on the other hand, displays a strong disapproving position towards US punitive damages, rejecting the alien phenomenon *in se*.[9]

Belgian courts should follow the Italian Supreme Court's approach and not disallow US punitive damages *a priori*. Analogous to Italian law, Belgian liability law also encompasses private law instruments akin to punitive damages or pursuing identical or similar goals. It should be kept in mind that the legal yardstick is the *international* public policy and the analysis should, therefore, be confined to the question whether foreign punitive damages are manifestly offensive to the international public policy. It is not necessary to prove that fully fledged punitive damages are part of the Belgian legal system.[10] Instead, to debunk the argument that punitive damages emanating from a foreign judgment are completely indigestible to our Civil Law stomach,[11] it suffices to show that Belgian law accommodates the pursuit of penal and/or deterrent goals in private

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7 C. Vanleenhove, *Punitive Damages in Private International Law: Lessons for the European Union* (Cambridge-Antwerp-Portland: Intersentia 2016), pp 158–159, with references contained therein.

8 Cour de Cassation 1re civ. 1 December 2010, *Schlenzka & Langhorne v. Fountaine Pajot S.A*, no. 09-13303, *Recueil Dalloz* 2011, p 423; Tribunal Supremo 13 November 2001, Exequatur no. 2039/1999, *Aedipr* 2003, p 914. See for an extensive analysis of both judgments C. Vanleenhove, *Punitive Damages in Private International Law*, pp 124–136 and 139–144, respectively.

9 Bundesgerichtshof 4 June 1992, *NJW* (*Neue Juristische Wochenschrift)* 1992, pp 3096–3106. See for an extensive analysis of the judgment C. Vanleenhove, *Punitive Damages in Private International Law*, pp 100–109.

10 Until two decades ago a 19th century law actually provided for double damages for damage caused to crops by rabbits: H. Bocken, I. Boone, with cooperation from M. Kruithof, *Inleiding tot het schadevergoedingsrecht: buitencontractueel aansprakelijkheidsrecht en andere schadevergoedingsstelsels* (Brugge: Die Keure 2014), p 205, para. 334.

11 C.I. Nagy, 'Recognition and enforcement of US judgments involving punitive damages in continental Europe', *NIPR* (*Nederlands Internationaal Privaatrecht*) 2012, p 7.

law (beyond the limited amounts of punishment and deterrence that are inherent by-products of compensatory damages[12]).[13]

Belgium does indeed form a habitat for punitive-like damages, despite punitive damages not having an official existence in the nation according to the Belgian *Cour de Cassation.*[14] An example of such a punitive mechanism is *l'astreinte.* It is essentially a periodic penalty imposed by a court on a debtor who fails to perform what is required of him. The penalty payment results from an act (e.g. the debtor enters the land of another person despite being ordered by a court not to do so) or an omission (e.g. the debtor fails to break down an illegally built wall) of the debtor. The penalty can be calculated per day of non-compliance but also per infringement. It should be underlined that *l'astreinte*, like punitive damages, is to be paid to the other party in the litigation. The penalty payment, however, does not intend to compensate that party for damages that result from the non-compliance. The sums are due in addition to the compensatory damages. The creditor thus receives more than the harm he suffered. The existence of *l'astreinte* thus contributes to the idea that penal mechanisms are present in private law.

The contractual penalty is another form of punishment within private law. Belgian law allows parties to insert a penalty clause into their contract (Arts 1226–1233 Civil Code). A penalty clause leads to the party failing to perform his obligation or failing to do it properly having to pay an amount of money as penalty to the other party. The clause is intended to encourage performance or, in other words, to deter the party from breaching the contract. The party requesting payment of the penalty does not have to prove the existence of any real damage. The (indirect) penal effect of the clause is thus obvious. The judge has the power to reduce the amount agreed upon if he finds the sum to be manifestly excessive (Art. 1231, section 1 Civil Code). Courts are, however, not allowed to award the other party less than the damage actually suffered. This means that the judge could moderate the penalty clause to a level above the damage incurred. The lower limit of the amount of actual damage thus opens the possibility for extra-compensatory damages to be awarded.

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12 U. Magnus, 'Comparative Report on the Law of Damages', in U. Magnus (ed), *Unification of Tort Law: Damages*, (The Hague: Kluwer Law International 2001), p 185; F. Pantaleón, 'Principles of European Tort Law: Basis of Liability and Defences. A critical view "from outside"', *InDret* 2005, p 6.

13 We have already performed this analysis (with a positive outcome) for France, Spain, Italy, Germany and England: C. Vanleenhove, *Punitive Damages in Private International Law*, pp 147–206.

14 Cour de Cassation 13 May 2009, AR P.09.0121.F, www.cass.be, *A&M (Auteurs & Media)* 2009, p 384.

A further example of 'punitive traces' can be found in Directive 2011/7 which deals with late payment in commercial transactions.[15] The Directive seeks to combat delays in payment between commercial parties, thereby fostering the functioning of the internal market.[16] It lays down the obligation for Member States to ensure that a creditor is entitled to interest for late payment without the necessity of a reminder. 'Interest for late payment' is defined as interest at a rate which is equal to the sum of the reference rate and at least eight percentage points.[17] The 'reference rate' is the interest rate applied by the European Central Bank to its most recent refinancing operations.[18] The idea behind the rule is clear: it should not be more favourable for a debtor to owe money to the creditor than to obtain credit from a bank.

We should assess the interest rate from the point of view of the creditor who cannot dispose of the sum owed to him. The loss suffered in such a case can be calculated by looking at the cost for the creditor to acquire a bank loan for the amount owed. The compensatory nature of private law is adhered to as long as the rate stays under the average rate banks charge when issuing a loan. However, to the extent that the interest rate exceeds this bank average it amounts to punitive damages.[19] The sanction provided for by Directive 2011/7 can at times thus be severe and could be viewed as punishment.[20] To put it more broadly, any legal interest higher than the average market interest for loans (and, *a fortiori*, higher than the lowest interest rate available) is extra-compensatory to the extent of the difference. The amount of the excess could be understood as pursuing a punitive aim.

Although principled objections to punitive damages should be discarded, the admittance of the remedy into the Belgian legal order should by no means be unbridled. The Belgian judiciary should employ a proportionality test to separate acceptable punitive damages from the intolerable ones. The French and Spanish German Supreme Courts have resorted to such an excessiveness test. The Italian *Corte di Cassazione* now follows suit. We have already extensively discussed how such a test should be construed, offering concrete guidelines for European judges.[21]

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15 Dir. 2011/7 of 16 February 2011 on combating late payment in commercial transactions, *OJ* L 48 of 23 February 2011, pp 1–10.

16 Art. 1.1.

17 Arts 2(5) & 2(6).

18 Art. 2(7), (a), (i).

19 N. Jansen & L. Rademacher, 'Punitive Damages in Germany', in H. Koziol & V. Wilcox (eds), *Punitive Damages: Common Law and Civil Law Perspectives* (Vienna: Springer 2009), p 84.

20 C. Cauffman, 'Naar een punitief Europees Verbintenissenrecht?', *TPR* (*Tijdschrift voor Privaatrecht)* 2007, p 806.

21 C. Vanleenhove, *Punitive Damages in Private International Law*, pp 210–236. See also C. Vanleenhove, 'A Normative Framework for the Enforcement of U.S. Punitive Damages in the European Union: Transforming the Traditional "¡No pasarán!"', 41. *Vermont Law Review* 2016, pp 377–401.